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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERSKINE WOOD
ERSKINE B. WOOD
1310 Yeon Building
Portland 4, Oregon.

STANLEY B. LONG
603 Central Building
Seattle 4, Washington

EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

October 13, 1958.

BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 15, 1957.

CITATIONS TO OPINIONS BELOW

The unreported memorandum opinion of the District Court for the District of Oregon, dated November 17, 1955, is printed as Appendix A hereto, *infra*, p. 1a.

The unreported findings of fact, conclusions of law and interlocutory decree of the District Court, dated February 10, 1956, are printed as Appendix B hereto, *infra*, p. 3a.

The Court of Appeals rendered three opinions. Its first opinion, delivered on May 31, 1957, is reported at 1957 A.M.C. 1181 and is printed as Appendix C hereto, *infra*, p. 9a. The second opinion was rendered on November 15, 1957, upon petitions for rehearing and substantially reversed the first opinion; it is reported at 1957 A.M.C. 2277 and is printed as Appendix D hereto; *infra*, p. 19a. The third opinion, denying on August 20, 1958, a further petition for rehearing, is reported at 1958 A.M.C. 1775 and is printed as Appendix E hereto, *infra*, p. 35a.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 31, 1957. A second judgment substantially modifying and reversing the first one was entered on November 15, 1957. A petition for rehearing as to the second judgment was denied with opinion on August 20, 1958. This petition for a writ of certiorari is filed less than 90 days after the denial of the rehearing petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Limitation of Liability Act, a corporate shipowner will be conclusively presumed to have privity or knowledge of an unseaworthy condition existing at the time a vessel leaves port.

regardless of the proof as to actual privity or knowledge, where the corporation delegated duties of inspection or repair to competent subordinates or agencies.

2. Whether, under the Limitation of Liability Act, a finding that a shipowner had no knowledge or privity as to the latent deffect of unseaworthiness is necessarily and fatally inconsistent with a finding that the shipowner did not use due diligence required by law to make the vessel seaworthy at the inception of the voyage.

3. Whether a shipowner, under the Limitation of Liability Act, is entitled to rely upon reports of seaworthiness made by qualified governmental and private investigating agencies where a latent and undiscovered defect causes loss.

4. Whether any welded ship which has been declared by competent authorities to be seaworthy following the repair of a crack more than 10 feet long is necessarily notch sensitive and therefore unseaworthy, imposing absolute and unlimited liability on the shipowner under the Limitation of Liability Act.

5. Whether the Court of Appeals misapprehended and grossly misapplied the appellate review standard as to findings of fact in an admiralty case where the court fails to reconcile the findings so as to give effect to all of them and where the court ignores substantial evidence in support of findings which it had previously sustained.

STATUTES INVOLVED

Limitation of Liability Act, 46 U.S.C. § 183:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge or such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

(The exceptions provided in (b) are immaterial here.)

Carriage of Goods by Sea Act, 46 U.S.C. § 1303:

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy; . . ."

Carriage of Goods by Sea Act, 46 U.S.C. § 1304:

"(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence . . .

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

". . . (p) Latent defects not discoverable by due diligence . . ."

Duties of the United States Coast Guard:

46 U.S.C. § 391:

"(b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years thereafter, the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure *suitable for the service in which she is to be employed,* has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment." (Emphasis supplied.)

American Bureau of Shipping Designated to Class all Merchant Vessels, 46 U.S.C. § 881:

"For the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus, and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends: Provided, That the Secretary of Commerce and the chairman of the commission shall each appoint one representative who shall represent the Govern-

ment upon the executive committee of the American Bureau of Shipping, and the bureau shall agree that these representatives shall be accepted by them as active members of such committee. Such representatives of the Government shall serve without any compensation, except necessary traveling expenses: Provided further, That the official list of merchant vessels published by the Government shall contain a notation clearly indicating all vessels classed by the American Bureau of Shipping."

STATEMENT

Petitioner's cargo vessel, the S. S. PENNSYLVANIA, was lost in a violent storm in the Gulf of Alaska on January 9, 1952. It was one of the greatest maritime disasters in the history of the Pacific Coast. Of her crew of 46, none survived. The vessel and all of her cargo, including all of the cargo of the respondents, were a total loss. No wreckage was ever found. Only her radiograms told of the distress which preceded her final plunge.

The vessel was a welded steel Victory-type ship built in 1944 by the United States Maritime Commission. Petitioner purchased her from the United States in 1951. During the seven years of her existence she operated in various ocean trades. Five trans-Pacific voyages were made during the one year of petitioner's ownership.

At all times this vessel had passed the inspections and surveys of the American Bureau of Shipping and the United States Coast Guard and was at all times declared by these agencies to be seaworthy. The last inspection had occurred in drydock only two weeks before her final sailing. On Voyage 5, the last voyage

preceding her fatal one, she had suffered a 22-foot crack in the plating of her starboard deck. Turning back to port, she was fully repaired to the satisfaction and approval of the United States Coast Guard, the American Bureau of Shipping, Lloyds of London, the United States Salvage Association and the repair yard, as well as of petitioner's staff. All of these agencies and individuals considered the vessel seaworthy once more. After this repair, she continued Voyage 5 across the Pacific and back without incident.

On January 5, 1952, the S. S. PENNSYLVANIA left Seattle, Washington, on Voyage 6 bound for Yokohama, Japan, over the Great Circle route. On the fourth day out of port, January 9, her radiograms showed the following sequence of events (Ex. 127):

At 5:35 ship's time she reported heavy winds and "mountainous" seas. A short time later she reported a 14-foot crack down the portside, in the engineroom, in a butt weld, starting in the sheer strake, between frames 93 and 94.[1] Noting a "very high westerly sea", she stated that she would turn around as soon as possible and proceed back to Seattle.

Subsequent radiograms revealed that, midst "very high seas", she was taking water in the engineroom,

[1] This description indicated that the new crack started in a butt weld, joining two plates, probably from a latent defect in the weld which created a "notch". The record demonstrates that no one knew of the existence of such a "notch" and that it was not discernible despite all the inspections following the repair of the earlier crack and preceding the final voyage. There was abundant testimony by experts that there was no relationship between the two cracks and that the prior 22-foot crack, which was 90 feet from the later 14-foot crack, did not result in weakening the vessel in other parts. R. 269, 299, 343, 470-471, 477, 847-848, 857, 2742-2743; 2764, 2804, 2884.

and later in No. 1 hold. Steering became difficult following a failure or breakdown of the ship's steering system, a defect which was later reported as remedied. No. 2 hatch was torn open and the deck load went adrift, the seas being too high to permit crewmen to get on deck to secure the load. Then an S.O.S. call went out. Soon thereafter she reported that steering had become impossible "as rudder too far out of water", adding that it "looks like only hope is for weather to moderate." A few minutes later a message was received that the crew was abandoning ship. Nothing more was ever heard.

The petitioner filed a petition in admiralty in the United States District Court for the District of Oregon for exoneration from or limitation of liability. Death claims were filed on behalf of the families of the lost seamen and cargo claims were filed by the owners or underwriters of the lost cargo. The death claims were all settled out of court. Trial then proceeded on the issues between petitioner and the cargo claimants, the respondents herein. The claimed value of this lost cargo was $2,157,335.15.

Petitioner claimed that, by virtue of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315,[2] it was not liable for the loss of the cargo and hence was entitled to a decree of exoneration. In that connection it was claimed that (a) the ship had been lost by a peril of the sea, i.e., a violent storm, (b) she was seaworthy, (c) petitioner had used diligence to make her seaworthy, and (d) if any defects did exist they were latent and not discoverable by due diligence.

[2] Petitioner also claimed the benefits of the identical Canadian Act, I Edw. VIII, c. 49, in relation to the lost cargo of the respondent Dominion of Canada.

Petitioner further claimed that if it should be determined that there was liability on its part it was still entitled to a decree of limitation under the Limitation of Liability Act, 46 U.S.C. § 183, since the loss of the cargo was "without the privity or knowledge" of the petitioner.

A protracted trial took place on the issues as thus framed. Many witnesses appeared and numerous documents and records were introduced. During the course of the trial respondents claimed that the 22-foot deck crack which had been repaired was notice to Vallet, petitioner's acting marine superintendent, that the vessel was subject to "crack sensitiveness," which in turn led to the 14-foot crack during the fatal storm. The uncontested testimony in this respect showed that "crack sensitiveness" is merely loose terminology for "notch sensitivity." The latter is a technical term referring to the fact that a crack in a steel plate will invariably develop or start, if at all, at a "notch" (by which is meant any angle like a hatch corner or any discontinuity like a bad weld in the metal of a welded steel ship). The steel is thus said to be "sensitive" to "notches" in that any steel will crack at a notch if enough stress is concentrated at the notch.

In the scientific sense, all welded ships are notch sensitive and the S. S. PENNSYLVANIA was in no way unique in being notch sensitive. Given a notch and sufficient stress at that point, a crack will occur. And the lower the temperature the more brittle the steel becomes. But there is no known non-destructive test to determine the notch sensitivity of steel, to determine when and where it will crack. The only acceptable test is to take the steel to a laboratory and

break it or destroy it in making a laboratory test. And since the test of one steel plate taken from a ship is no test of an adjoining plate, which may have been made at a different time in another mill, there is no way of testing a whole ship short of its substantial destruction.

On November 17, 1955, the District Court rendered a memorandum opinion. Appendix A hereto, *infra*, p. 1a. The court held that the storm was not of such magnitude as to constitute a peril of the sea and that the fact that other vessels withstood the wind and the seas "leads to the inescapable conclusion that the Pennsylvania was not seaworthy, or it too would have survived." But the court also stated that just "what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty" and that "any defects in the vessel which caused her to sink were not apparent." The court concluded that "those charged with her inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without the privity or knowledge of the owner of the vessel." Accordingly, the court ruled that petitioner was "entitled to limit the liability of the vessel to the pending freight" pursuant to the Limitation of Liability Act.

The court subsequently, after a brief hearing, accepted almost verbatim the findings submitted by the respondent United States.[3] See Appendix B hereto.

[3] The court declined to accept findings and a decree proposed by petitioner to the effect that it was entitled to exoneration under both the Carriage of Goods by Sea Act and the Canadian Act since the defects, if any, were said by the court in its opinion to be "latent", and since the court unqualifiedly held that "those charged with her inspection used the care of reasonable and prudent persons."

infra, p. 3a. The important findings so adopted were briefly as follows:

Finding III: The storm in which the vessel sank was not of such magnitude as to constitute a peril of the sea. The sole and proximate cause of the sinking was the vessel's own unseaworthiness.

Finding IV: The contributory factors responsible for the sinking, as revealed by the radiograms, were: (1) the sustaining of a crack down the portside; (2) the entry of water into the engineroom through this crack; (3) the sustaining of a failure or breakdown of the steering system for a time; (4) the taking of water in No. 1 hold; and (5) the coming adrift of the deck cargo and the filling of No. 2 hatch with water.

Finding V: The aforementioned faults and failures, "together with the crack sensitiveness of the vessel to extreme cold weather by reason of a former 22-foot crack in her deck occurring on her previous Voyage V, which crack was fully repaired," were factors of unseaworthiness culminating from the unseaworthy condition at the inception of the voyage which proximately caused the vessel's sinking during weather that should have been expected and anticipated.

Finding VI: The evidence was insufficient to show that "petitioner used the due diligence required by law to make the vessel seaworthy at the inception of her voyage" so as to entitle it to exoneration from liability.

Finding VII: But "the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity

or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

An interlocutory decree in accordance with these findings was entered on February 16, 1956. The decree denied exoneration but granted limitation, holding petitioner liable only up to the pending freight value of $82,256.25 plus interest. Petitioner thereafter appealed from that part of the decree denying exoneration, while respondents appealed from the limitation imposed by the decree.

On May 31, 1957, the Court of Appeals for the Ninth Circuit, finding ample evidence to support the foregoing findings,[4] unanimously affirmed the District Court's decree in all respects. Appendix C hereto, *infra*, p. 9a. With reference to the portion of the decree limiting liability and Finding VII (finding the unseaworthiness was not with petitioner's privity and knowledge), the Court of Appeals found substantial supporting evidence that:

1. Vallet, petitioner's acting marine superintendent, had no knowledge of any defect in the steering mechanism prior to the start of the last voyage;

2. Coast Guard inspectors, who checked the steering gear, found it in good condition prior to that last voyage; and

[4] The Court of Appeals expressly relied upon this Court's ruling in *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Appendix C hereto, *infra*, p. 11a.

3. The previous crack in the deck plates had been completely repaired and fragments of the steel had been sent to the National Bureau of Standards, which found the tensile strength better than the requirements in effect when the ship was built. Hence Vallet could be charged with no knowledge of the vessel's "crack sensitivity."

All parties filed petitions for rehearing. On November 15, 1957, the Court of Appeals denied petitioner's request for rehearing as to the denial of exoneration. At the same time and without allowing opportunity for further argument, the court granted respondents' request that the affirmance of the limitation portion of the decree be reconsidered. It thereupon withdrew the portion of its initial opinion which approved the limitation of liability and substituted therefor an opinion which concluded that it was error to limit liability. Appendix D hereto, *infra*, p. 19a.

This new judgment of the Court of Appeals was bottomed on the premise that Finding VII was "completely inconsistent" with Finding VI and hence was fatally defective as a basis for granting limitation. Finding VI had been to the effect that petitioner had not used the due diligence required by law to make the vessel seaworthy at the inception of the last voyage and to entitle it to exoneration. The Court of Appeals reasoned that the only persons whose lack of due diligence could have been involved in Finding VI were petitioner's managing officers, including Vallet. Since one of the factors of unseaworthiness had been found to be the vessel's crack sensitivity (Finding V), Vallet did not use due

diligence in correcting that factor before the last voyage began (Finding VI). Hence, the court said, it was erroneous for Finding VII to conclude that the unseaworthy factor of crack sensitivity at the inception of the voyage was without the privity and knowledge of petitioner, acting through Vallet. The Court of Appeals recited at length certain evidence which was said to show that Vallet knew or should have known of the vessel's crack sensitivity.

Petitioner sought a rehearing of this new judgment of reversal as to limitation. On August 20, 1958, the Court of Appeals denied rehearing with an opinion that purported to clarify its second opinion dated November 15, 1957. Appendix E hereto, *infra*, p. 35a. In this third opinion the Court of Appeals again denied limitation on the ground that Finding VII was erroneous and that the 22-foot deck crack was notice to Vallet that the vessel had a crack sensitivity, was thereby unseaworthy and should not have been allowed to sail.

REASONS FOR GRANTING THE WRIT

1. The Judgment of the Court of Appeals on Rehearing is Directly in Conflict With the Applicable Decisions of This Court as to the Proper Scope of Appellate Review of Trial Court Findings and as to the Impact of the Limitation of Liability Act.

The Court of Appeals, in rendering its judgment on rehearing on November 15, 1957, has ruled in a manner not only inconsistent with its own prior judgment of May 31, 1957, but also with the applicable rulings of this Court. These conflicts involve several important aspects of admiralty law and in no way call upon this Court to review or resolve disputed issues of fact.

a. Appellate review standards

In *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), this Court ruled that a trial court finding in an admiralty case should not be set aside unless it is "clearly erroneous", and that a finding is not "clearly erroneous" unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In its original opinion of May 31, 1957, the Court of Appeals paid explicit heed to this standard of appellate review. After a careful reading of the District Court's findings and an examination of the entire record, the Court concluded that none of the findings was "clearly erroneous" and that those findings fully sustained the District Court's conclusions as to exoneration and limitation of liability. But in its subsequent judgment of November 15, 1957, as supplemented by the opinion of August 20, 1958, the Court of Appeals misapprehended and grossly misapplied the *McAllister* review standard. Such misapprehension and misapplication constitute so great a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

A simple yet fundamental facet of the appellate review standard is that the appellate court must treat the trial court findings, to the extent possible, in a manner consistent with the conclusions reached. *Larkin* v. *Upton*, 144 U.S. 19, 21 (1892). The findings must be read together and seemingly inconsistent ones must be harmonized and reconciled so as to prevent conflict on material points, if possible.

Here the District Court held that the petitioner was not entitled to exoneration, but was entitled to limitation of liability. In its original opinion, the Court of Appeals properly read the underlying findings in a consistent manner and in light of the District Court's opinion that just "what latent defects in hull or equipment were responsible for the disaster cannot be determined with certainty."[5] So viewed, Finding VI was read to mean that, with respect to the various possible factors of unseaworthiness mentioned in Findings IV and V, petitioner lacked due diligence in failing to correct one or more of them. Such negligence may have related to something other than failure to correct the vessel's crack-sensitivity. It may have involved merely the neglect of a non-managerial employee to lash the deck cargo properly or to check the steering mechanism. Any such neglect by a non-managerial employee would have been ascribed to petitioner and hence would have been enough to warrant denial of exoneration.[6]

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[5] To the extent that the findings were unclear as to the factors of unseaworthiness as to which the lack of due diligence related, it was proper to refer to the accompanying opinion of the District Court "in order to clarify the meaning of a finding otherwise in doubt." *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 480 (1937). Moreover, it was enough if the findings stated only the ultimate facts rather than a recital of the evidence tending to prove the ultimate facts. *Raimond* v. *Terrebonne Parish*, 132 U.S. 192 (1889).

[6] "The lack of due diligence which will deprive the owner of exoneration under the Carriage of Goods by Sea Act "refers not merely to a failure of personal diligence on the part of the owners, but also to a failure of diligence by those employed by them to make the ship seaworthy." *Ore Steamship Corp.* v. *D/S A/S Hassel*, 137 F. 2d 326, 330 (C.A. 2, 1943).

At the same time, Finding VII was interpreted to mean that none of petitioner's managerial personnel —particularly Vallet—had any knowledge or privity as to any of the unseaworthy conditions. Since Finding VI, in light of the uncertainty of the circumstances, did not necessarily mean that Vallet negligently failed to correct the crack-sensitive condition, it was consistent to find that he had no knowledge or privity as to that condition.

But on rehearing, the Court of Appeals reversed its own reading of these findings and created an inconsistency where none need have existed. The court insisted that Finding VI must be interpreted to cover negligence as to the crack-sensitivity factor, that only Vallet could have been neglectful in that respect, and that it was therefore inconsistent for Finding VII to fail to impute to him knowledge of this defect.

Having satisfied itself that the trial court meant more in Finding VI than was said as to negligence in failing to correct the crack-sensitivity,[7] the Court of Appeals proceeded to re-examine the evidence relative to Finding VII. This time the Court of Appeals disregarded completely the supporting evidence it had taken pains to point out in the first opinion:[8]

> "As to his [Vallet's] knowledge of the 'crack sensitivity' of the vessel, the previous crack in

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[7] Finding VI actually said nothing about lack of due diligence in discovering the vessel's crack sensitivity. The finding could have been interpreted as relating to lack of due diligence only as to other factors of unseaworthiness.

[8] Appendix C hereto, *infra*, p. 18a.

her deck plates had been completely repaired. Fragments of her steel were sent to the National Bureau of Standards, and a metallurgist of the Bureau testified that its tensile properties were better than the requirements in effect when the ship was built. The crack on the port side and the taking of water in the No. 1 hold are not imputable to the knowledge or privity of Vallet."

Instead, the issue was viewed *de novo* and the entire emphasis was laid on other evidence which was said to warrant the conclusion that Vallet knew or should have known of the crack-sensitivity[9] of the vessel. Such evidence was at best controverted and disputed. By such process, a finding that was not clearly erroneous on May 31, 1957, was made clearly erroneous on November 15, 1957, the date of the second appellate opinion.

Such a *de novo* reviewing of the evidence was plainly improper under the review standard referred

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[9] Thus the Court of Appeals laid great stress on the fact that Vallet had read the 1946 Report of the Board of Investigation, convened by the Secretary of the Navy, on "The Design and Methods of Construction of Welded Steel Merchant Vessels." Ex. 185. The court referred to a passage in that report that the indication was that after a ship has had a previous casualty involving cracks and steel failures "it is somewhat more liable to a casualty than before the first." But the court overlooked the fact that this statement was made only by a subcommittee and that it was rejected by the Board of Investigation, which rendered the more significant conclusion that "A tendency for certain ships to incur repeated casualties can be measured but the trend is not great and the effect is *not significant*." Ex. 185, p. 10; emphasis supplied. Moreover, the subcommittee's repudiated statement was premised solely on a table which compared the number of ships which had actually suffered repeated fractures while in service with the number that theoretically might be expected, solely according to the abstract, mathematical laws of chance.

to in *McAllister* v. *United States*, *supra*. Finding VII, relating as it did to privity and knowledge, was primarily one of fact. *LaBourgogne*, 210 U.S. 95, 117 (1908); *Corgell* v. *Phipps*, 317 U.S. 406, 411 (1943). If there was adequate evidence to support Finding VII—as the Court of Appeals conceded in its first opinion—it became irrelevant that there might be other evidence to support an opposite finding or that the Court of Appeals, were it sitting as a fact-finding body, might have formulated a different finding. Petitioner was entitled to have the evidence viewed in the light most favorable to the trial court's finding, which was presumptively correct. So viewed, Finding VII was not "clearly erroneous". Under the circumstances, the action of the Court of Appeals in this case constitutes a gross abuse of its reviewing powers which demands correction by this Court.[10]

b. The absolute imputation of knowledge

The Court of Appeals thus improperly read Finding VI to cover lack of due diligence as to the unseaworthy factor of crack sensitiveness. It then proceeded to hold that this lack of due diligence was that of Vallet, petitioner's acting marine superintendent, and that petitioner was thereby charged with privity and knowledge as to the crack sensitiveness. In so holding, the court below rendered a judgment directly

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[10] Even if the Court of Appeals were correct in its conclusion that Findings VI and VII were inconsistent, the court should have remanded the matter to the District Court to clarify the findings and eliminate the inconsistency. See *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 479-480 (1937). It was improper for the Court of Appeals to eliminate the inconsistency by a *de novo* review of the evidence.

in conflict with the applicable decisions of this Court under the Limitation of Liability Act.

One basis for reaching this conclusion as to petitioner's knowledge was the court's adoption of a concept that any lack of due diligence with respect to the structural seaworthiness of the vessel prior to commencing its voyage is necessarily and absolutely imputed to management.[11] In other words, the court held as a matter of law that the duty to exercise due diligence to make the ship structurally seaworthy is nondelegable not only under the Carriage of Goods by Sea Act but also under the Limitation of Liability Act.

As has been said by the textbook authors relied upon by the Court of Appeals,[12] such a ruling is merely "a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach or, more directly, that the corporation will not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge." These authors say that corporate owners cannot escape unlimited liability by delegating duties of inspection or repair to a master, to independent agencies or to subordinate shore officials. Thus Vallet himself was held to have the absolute duty to discover and repair the unseaworthy factor of crack sensitiveness and he could in no way delegate that duty or rely upon the inspections and repairs of competent men in performing that duty. In short, he had no right to rely upon the inspections and reports of his subordinate officers or of the Coast Guard and the American

[11] The court adopted this concept in its last opinion, rendered on August 20, 1958. See Appendix E hereto, *infra*, pp. 38a-40a.

[12] Gilmore and Black, The Law of Admiralty, pp. 701-702 (1957).

Bureau of Shipping. And if he did so rely, knowledge of any defects that did in fact exist was absolutely imputed to him.

Such an automatic equation of lack of due diligence with privity or knowledge in any case where the vessel later proves to have been unseaworthy at the commencement of her voyage is in flat conflict with this Court's decision in *Coryell* v. *Phipps*, 317 U.S. 406, 412 (1943). There this Court held that "one who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred during the period of storage, unless 'privity' or 'knowledge' are to become empty words."[13]

The ruling below also conflicts directly with this Court's decision in *Earle & Stoddardt* v. *Ellerman's Wilson Line*, 287 U.S. 420, 427 (1932), that an owner's lack of due diligence, which in other connections would constitute breach of a non-delegable duty, is not the equivalent of the owner's personal neglect. It is also in conflict with the long established decisions in other circuits holding that the duty to make the ship sea-

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[13] The principle thus enunciated by this Court has been well stated in *The Erie Lighter 108*, 250 Fed. 490, 494 (D. N.J. 1918): "It is also entirely well settled that an owner, and, in the case of a corporation, the managing officer or officers (in this case the superintendent of the marine department), may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and, if due diligence is exercised in selecting persons competent for such work, losses or damages done or occasioned through their fault, without actual complicity or knowledge on the part of the owner are done or occasioned without the 'privity or knowledge' of the owner within the meaning of the Limited Liability Acts."

worthy, although non-delegable under the Harter Act or the Carriage of Goods by Sea Act, is delegable under the Limitation Act. *The City of Camden,* 292 Fed. 93, 97 (C.A. 3, 1923); *Pocomoke Guano Co.* v. *Eastern Transp. Co.,* 285 Fed. 7 (C.A. 4, 1922); *The Tommy,* 151 Fed. 570 (C.A. 2, 1907); *Quinlan* v. *Pew,* 56 Fed. 111 (C.A. 1, 1893). See also *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.,* 199 F. 2d 134, 143 (C.A. 4, 1952).

c. The equation of negligence and knowledge

Even if Finding VI and the record could be fairly said to mean that petitioner, acting through Vallet, lacked due diligence in failing to correct the unseaworthy factor of crack-sensitivity, it does not follow that Finding VII was inconsistent or that liability should be unlimited. And the ruling of the Court of Appeals that limited liability was improper under these circumstances directly conflicts with principles long established by this Court pertaining to the Limitation of Liability Act.

Indeed, so sharp is the conflict with the decisions of this Court that the result below can only be described as a calculated refusal to administer the Act "in the spirit of fairness, with a view of giving the shipowners the full benefit of the immunities intended to be secured by it." *Providence Co.* v. *Hill Co.,* 109 U.S. 578, 580 (1883). See also *Coryell* v. *Phipps,* 317 U.S. 406 (1943).

The error of the opinion below and the conflict with this Court's decisions lie in the automatic equation of two separate and distinct statutory concepts: (1) lack of due diligence, or negligence, and (2) privity and knowledge. The court below held that

since Vallet lacked "due diligence" in not correcting the crack sensitiveness, that unseaworthy condition must have existed with the "privity or knowledge" of Vallet and hence of petitioner. Limitation of liability was thereby felt to be improper. Such an equation of concepts and denial of limitation took place in a situation where the crack sensitivity was by definition of a most latent character.

As long ago as 1883 in *Providence Co.* v. *Hill Co.*, 109 U.S. 578, 602-603, this Court made it plain that there is no necessary or automatic equation between the aforementioned concepts. In that case, a shipowner had been found guilty of neglect because of fire on board ship, but he was allowed to limit his liability because he proved that the cause of the fire was without his privity or knowledge. Exoneration and limited liability were held to be two separate defenses, exoneration being a complete rather than a partial defense and requiring a different degree of proof. This Court held that "there is no inconsistency or repugnancy" between the two defenses, and that in a particular case exoneration might be denied while liability was being limited.

A more elaborate statement of the applicable principle is to be found in this Court's opinion in *LaBourgogne*, 210 U.S. 95, 122 (1908), where it was said:

> ". . . although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner.
>
> "Without seeking presently to define the exact scope of the words 'privity and knowledge', it is apparent from what has been said that it has been

> long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity or knowledge within the meaning of the statute."

This rule has been quoted and followed by innumerable lower federal courts.[14]

It has been suggested, however, that the rulings in the *Providence* and *LaBourgogne* cases represent the older case law, while the more recent cases treat negligence as a synonym for privity or knowledge "so that if the right to exonerate is lost the right to limitation automatically vanishes."[15] Apart from the fact that the more recent cases are lower court decisions that do not support such an equation, this Court has never repudiated or limited the language or holding of the *Providence* and *LaBourgogne* decisions. And if the concepts of negligence and knowledge are to be equated for purposes of the Limitation of Liability Act it should be done only after thorough review and consideration by this Court.

It is true, of course, that it has been held that the knowledge or privity which precludes limita-

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[14] See, e.g., *The Galileo*, 54 F. 2d 913, 915 (C.A. 2, 1913); *Patton-Tully Transp. Co.* v. *Turner*, 269 Fed. 334, 340 (C.A. 6, 1920); *Southern Pacific Co.* v. *United States*, 72 F. 2d 212 (C.A. 2, 1934); *Kitsap County Transp. Co.* v. *Harvey*, 15 F. 2d 166 (C.A. 9, 1926); *The Virginia*, 264 Fed. 986 (D.C. Md., 1919), aff'd. sub nom. *Hines* v. *Butler*, 278 Fed. 877 (C.A. 4, 1921); *Hockley* v. *Eastern Transp. Co.*, 10 F. Supp. 908, 916-917 (D.C. Md. 1935).

[15] Gilmore and Black, The Law of Admiralty, § 10-21, p. 697 (1957). The more recent cases referred to are *The Doris Kellogg*, 18 F. Supp. 159, 169 (S.D.N.Y., 1937); *Great Atlantic & Pac. Tea Co.* v. *Lloyd Brasileiro*, 159 F. 2d 661, 664 (C.A. 2, 1947); *The Edmund Fanning*, 105 F. Supp. 353, 371 (S.D.N.Y., 1952).

tion of liability "means not only personal cognizance but also the means of knowledge . . . of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." See *The Clevveco*, 154 F. 2d 605, 613 (C.A. 6, 1946). But the fact remains that lack of due diligence or negligence is a concept apart from knowledge or the means of knowledge, and proof or lack of proof as to one concept does not necessarily apply to the other concept.

Thus it is that the record in this case may, and does, demonstrate that, if Vallet was in some way negligent in not correcting the crack-sensitivity of the S.S. PENNSYLVANIA, it was a defect so latent that it would be unfair to impute any knowledge or means of knowledge to him. The failure of the court below to review the findings and conclusions as to liability in light of the distinction between due diligence and knowledge is not only contrary to this Court's decisions in *Providence Co.* v. *Hill Co.*, *supra*, and *LaBourgogne*, *supra*, but also is indicative of the danger which this Court expressed through Mr. Justice Holmes in *Capitol Trans. Co.* v. *Cambria Steel Co.*, 249 U.S. 334, 336 (1919), "the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge."

2. The Ruling Below That Petitioner Was Not Entitled to Rely Upon Official Surveys, Inspections and Reports Following the Repair of the Previous Crack is in Direct Conflict With the Ruling of the Court of Appeals for the Second Circuit in Peter Paul, Inc. v. Rederi A/B Pulp, 258 F. 2d 901.

After the repair of the 22-foot crack on the deck of the S.S. PENNSYLVANIA, incurred during Voyage 5, the vessel was surveyed and inspected in port by repre-

sentatives of the American Bureau of Shipping (R. 896-7), the United States Coast Guard (R. 869, 875, 876), the United States Salvage Association (R. 1130-1131), Lloyds of London (R. 1123), the shipyard that did the repairing (R. 849), and by petitioner's port engineer and its chief engineer for the vessel. After the ship went on to complete Voyage 5, the vessel was placed in drydock for its annual drydock inspection. There it was inspected again by representatives of the United States Coast Guard, the American Bureau of Shipping and the petitioner itself. These latter inspections were "from deck down to tank tops" (R. 692) and covered "the whole hull from stem to stern" (R. 733). All of these inspections resulted in favorable reports as to seaworthiness and the earlier reports following the repair of the 22-foot deck crack were directed specifically to that problem.

The Court of Appeals charged petitioner, through its acting marine superintendent Vallet, with privity and knowledge of the crack sensitiveness of the vessel under low temperatures despite the failure of any of these inspections to uncover or report such sensitiveness. The court said the very fact of the prior crack on the deck was significant with respect to the crack sensitiveness in other portions of the vessel. Aside from the grounding of that statement upon a misinterpretation of a written report (see footnote 9, *supra*), the fact remains that the qualified representatives of these various Government and semi-official agencies did not so view the after-effects of the known crack on the deck and they discovered and reported no crack sensitiveness prior to the inception of the last voyage. Indeed, as the Court of Appeals acknowledged in its first opinion, the National Bureau of

Standards actually tested steel fragments from the vessel following the crack repair and found the tensile properties better than the requirements in effect when the ship was built. Appendix C hereto, *infra*, p. 18a.

Under these circumstances, petitioner was entitled to rely upon such inspections and reports—at least to the extent of being freed of any imputation of knowledge or privity as to the existence of crack sensitiveness. The failure of the Court of Appeals to recognize that petitioner's lack of knowledge of the crack sensitiveness could be ascribed to these reports and inspections is directly contrary to the recent ruling of the Court of Appeals for the Second Circuit in *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2d 901 (August 27, 1958).

In the *Peter Paul* case, the steel cargo vessel CHRISTER SALEN suddenly and without warning split in two on the high seas. A few months previously the vessel had suffered a crack at the top of its portside bulwark. This crack was repaired and the vessel was then dry-docked for its regular inspection. Inspection was made by representatives of Lloyds of London, who inspected the hull and found it to be in good condition. A month later the ship cracked in two due to a latent sensitivity in a notch.

The Court of Appeals for the Second Circuit held that the shipowner was entitled to rely upon the Lloyds inspection and report "unless there is some evidence of bias, incompetence or fraud." That court held further that " all the shipowner need establish is that normal precautions were taken to see that a discoverable notch did not exist." There, as in the instant case, the sensitivity was a latent defect not discovered by those charged with thorough inspection.

The conflict between the two cases is the more striking in that the issue in the *Peter Paul* case was whether due diligence had been used under the Carriage of Goods by Sea Act, where the duties are non-delegable and the obligations of the shipowner more severe. In the instant case, on the other hand, the issue was merely privity or knowledge under the Limitation of Liability Act, where the duties are delegable and the obligations much less. But notwithstanding the onerous conditions to be fulfilled by the shipowner in the *Peter Paul* case, the court there held that the shipowner could rely on the judgment of the recognized expert agency. In the circumstances of the instant case, where the onerous conditions are less, the Court of Appeals held that the shipowner could not rely on such judgments.

The right to rely on competent inspections is a fundamental problem in admiralty law and of the utmost importance to shipowners in the conduct of their business. This conflict between circuits should be resolved.[16]

It has long been established, moreover, that a shipowner can select competent inspecting agencies and rely on their surveys, reports and findings as to seaworthiness. Even if such agencies fail to use due diligence in finding factors of unseaworthiness, the shipowner, not being in privity, has been held entitled to limitation. *Earle & Stoddardt* v. *Ellerman's Wilson Line*, 287 U.S. 420 (1932); *Coryell* v. *Phipps*, 317 U.S.

[16] The Court of Appeals for the Second Circuit in the *Peter Paul* case referred to the second opinion of the court below by merely voicing the holding that the prior 22-foot crack in the deck of the S.S. PENNSYLVANIA "should have put the owner on notice that he had an unseaworthy vessel." It did not rely upon the opinion below or otherwise indicate that it approved or agreed with that opinion in any way. 258 F. 2d at 905.

406 (1943); *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134 (C.A. 4, 1952); *The Annie Faxon*, 75 Fed. 312 (C.A. 9, 1896); *The Columbia*, 25 F. 2d 516 (E.D.N.Y., 1927); *The South Coast*, 71 F. 2d 891 (C.A. 9, 1934); *General Foods Corporation* v. *The Troubador*, 98 F. Supp. 207 (S.D.N.Y., 1951); *The Erie Lighter 108*, 250 Fed. 490 (D.N.J., 1918). But the effect of the present decision is that the petitioner is not entitled to rely on such reports and is fully liable if the ship proves to be crack sensitive. This is an obvious departure from the law of limitation that calls for the invocation of the reviewing jurisdiction of this Court.

3. The Issues Raised by the Rulings of the Court of Appeals Are Important in the Administration of the Limitation of Liability Act and to the Entire Maritime Industry.

It has always been the policy of Congress, as expressed repeatedly in the decisions of this Court, to have the Limitation of Liability Act administered in accord with its intent to encourage shipping and not with a "tight and grudging hand." That purpose is not achieved by the rulings below that privity or knowledge is the necessary equivalent of lack of due diligence and that a shipowner's reliance on acknowledged expert investigators will not prevent the imputation of knowledge of a latent defect. If those rulings are allowed to stand, then the statute has indeed been amended in significant ways beyond the legislative intent. It thus becomes appropriate for this Court to grant certiorari to review and correct these important rulings.

The importance of the issues thus raised to the maritime industry is self-evident. Since World War II

there have been at least 4,700 cases of hull cracking reported aboard welded steel vessels constructed by wartime shipyards.[17] Most of these fractures have been minor. Under the ruling below, the owners of such vessels are charged with knowledge and privity that the ships are likely to fracture at certain temperatures in some other portion of the ship unrelated to the original fracture. Absolute and unlimited liability is thus imposed upon the shipowners in all cases of loss resulting from a second and completely unexpected fracture.

They are held to higher standards of knowledge than imposed upon such competent agencies as the Coast Guard and the American Bureau of Shipping. Indeed, the level of care thrust upon shipowners is beyond that scientifically possible as to such latent defects as crack sensitivity.

Such a result flies in the face of all expert testimony[18] and openly flouts all governmental and private agencies who, after thorough investigation, declare these vessels to be seaworthy. No matter how latent or undiscov-

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[17] New York Journal of Commerce, Dec. 19, 1957, p. 11.

[18] David P. Brown, Senior Vice President and Technical Manager of the American Bureau of Shipping and a former member of the working group of the Board of Investigation whose report the Court of Appeals relied upon (see footnote 9, *supra*), testified in this case as follows (R. 2743):

> "Q. Does the fact that a ship has cracked—take a major crack like this crack in the deck of the Pennsylvania—does that indicate any tendency or propensity of that ship toward cracking? . . .
>
> "A. Insofar as the vessel is concerned, we have never been able to establish any significance."

There was no testimony to the contrary.

erable the crack sensitivity may be in the ordinary and reasonable course of investigation by these agencies, the shipowner by the ruling below is held to know more than such agencies and "to possess the combined knowledge and skill of a naval architect and metallurgist." Cf. *Peter Paul, Inc.* v. *Rederi A/B Pulp*, 258 F. 2d 901, 906 (C.A. 2, Aug. 27, 1958).

It is small wonder then, that the decision below has created consternation in the maritime industry. As described by one leading journal,[19] the decision reveals "a great ignorance of matters maritime" and "puts many shipowners in a practically indefensible position in litigaton arising from maritime losses." Another journal[20] has referred to the ruling that petitioner should have known of the crack sensitivity of the S.S. PENNSYLVANIA despite the declarations of seaworthiness by the Coast Guard and the American Bureau of Shipping as having "a most serious effect on shipping everywhere." A seaworthy certificate, it was said, "is the only proof that any shipowner can present to certify his intent to provide a seaworthy ship, and the present ruling, if finally upheld, casts a doubt on this," making it "difficult to speculate on what could take its place."[21]

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[19] Editorial, "Liability of Shipowners Expanded by Judicial Ruling," *Marine Engineering*, February, 1958, p. 13. The effect of the decision was said to be the same "as outlawing pneumatic tires on automobiles because a blow-out caused the death of some occupants" and as charging the driver with negligence "for not having solid rubber wheels on his car."

[20] Editorial, "Vessel Liability," *The Mariner*, January, 1958, p. 32.

[21] Ibid, pp. 32-33.

The General Counsel of the United States Maritime Commission has publicly declared that the decision below is a startling example of a predicted tendency in the second half of the Twentieth Century to construe the Limitation of Liability Act "narrowly and not expansively" and that the court here "refused to permit limitation in circumstances where, in the opinion of many, the owner would have been allowed to limit in times past."[22] "It seems quite possible," said the General Counsel, "that the Court of Appeals might have been motivated, at least in part, by a feeling that the result of our Limitation Act is unduly harsh . . . but in any event the present opinion is a manifestation of the judicial erosion that can be expected unless a limitation formula is adopted that meets the sense of justice, and if Congress doesn't wholly eliminate the doctrine."[23]

The public interest in and the manifest error of the rulings below thus combine to warrant the grant of certiorari in this case.

[22] Mr. E. Robert Seaver, General Counsel for the United States Maritime Commission, made this statement in a paper, "Comments Regarding the 1957 Brussels Convention on Limitation of Shipowners' Liability," submitted to the Maritime Law Association of the United States, Document No. 418, pp. 4269-70 (July, 1958).

[23] Ibid, p. 4270.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment rendered by the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

ERSKINE WOOD
ERSKINE B. WOOD
1310 Yeon Building
Portland 4, Oregon

STANLEY B. LONG
603 Central Building
Seattle 4, Washington

EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

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